U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 20 January 2012

BALCA Case No.: 2010-PER-01548
ETA Case No.: A-08009-11356

In the Matter of:

RCI, LLC,
Employer

on behalf of

ABHISHEK POYKAYIL JAYANANDA PANICKER,
Alien.

Certifying Officer: William L. Carlson
Atlanta National Processing Center

Appearances: Anthony F. Siliato, Esquire
Newark, New Jersey
For the Employer

Gary M. Buff, Associate Solicitor
Vincent C. Constantino, Senior Trial Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **Romero, Avery, and Kennington**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the "PERM" regulations found at Title 20, Part 656 of the Code of Federal Regulations (C.F.R.).

BACKGROUND

On January 23, 2008, the Certifying Officer (CO) accepted for processing Employer's Application for Permanent Employment Certification (ETA Form 9089) for the position of "Director-Global Inventory Management & Pricing." (AF 135-151).[1] Because the application was for a professional position, Employer listed three types of professional recruitment, one of which was an employee referral program with incentives. (AF 139).

On March 21, 2008, the CO notified Employer that its ETA Form 9089 was selected for audit. (AF 131-134). Among other documentation, the CO directed the Employer to submit its recruitment documentation. (AF 131). Employer responded on April 11, 2008. (AF 73-130). The referral guidelines memorandum provided by Employer was not dated and did not reference the job for which labor certification was being sought. (AF 125-126). On March 4, 2010, the CO denied certification of Employer's application on the ground that Employer failed to provide adequate documentation of the employee referral program as required by 20 C.F.R. § 656.17(e)(1)(ii)(G). (AF 70-72).

Employer requested reconsideration on April 1, 2010. (AF 3-69). On September 1, 2010, the CO issued a letter of reconsideration. (AF 1-2). The CO determined Employer's request did not overcome the deficiency stated in the determination letter. The CO determined that Employer did not demonstrate that its employees were made aware that the incentives were available in the position at issue. The CO concluded that Employer "failed to document a logical nexus between its referral program and its recruitment efforts." (AF 1). Therefore, the CO determined that the reason for denial was valid pursuant to 20 C.F.R. § 656.17(e)(1)(ii)(G) and thus forwarded the case to BALCA. (AF 1-2).

On November 5, 2010, BALCA issued a Notice of Docketing. Employer filed a Statement of Intent to Proceed on November 23, 2010. On December 20, 2010, Employer filed a supplemental legal brief. Employer argued that the regulations do not require that it document a logical nexus between its referral program and its recruitment

[1] In this decision, AF is an abbreviation for Appeal File.

efforts. On December 22, 2010, the CO filed a Statement of Position requesting affirmation of the CO's denial of labor certification.

DISCUSSION

Under 20 C.F.R. § 656.17(e)(1)(ii), one of the additional recruitment steps an employer can utilize in advertising a professional occupation is an employee referral program with incentives. This step "can be documented by providing dated copies of employer notices or memoranda advertising the program and specifying the incentives offered." 20 C.F.R. § 656.17(e)(1)(ii)(G).

The regulations require an employer to maintain all supporting documentation of all recruitment steps taken and all attestations made in the application for labor certification for five years. 20 C.F.R. §§ 656.10(f), 656.17(a)(3), 656.17(e)(1). A substantial failure by an employer to provide the documentation required by the audit will result in the application for permanent labor certification being denied. 20 C.F.R. § 656.20(b).

The Board has stated that while 20 C.F.R. § 656.17(e)(1)(ii)(G) uses the permissive "can" rather than "shall," the regulation nonetheless, "notifies employers that the specifics of the program's incentives, and the dates that the program was advertised, are elements of adequate documentation." *Ove Arup & Partners Consulting Engineers, PC*, 2010-PER-00013, slip op. at 7 (July 20, 2010). Thus, the Board held that documentation of a referral program is insufficient where it does not provide the basic information identified in the regulation. *Id*. at 8.

Employer cites *Clearstream Banking S.A.*, 2009-PER-00015 (March 30, 2010), arguing that documentation of a generic referral program with incentives is sufficient where employees are made aware of the existing position through an internal posting. In *Clearstream Banking*, the Board held that documentation of a general referral program together with a notarized attestation that incentives were available for the position in question was sufficient to meet the documentation requirements of 20 C.F.R. § 656.17(e)(1)(ii)(G). *Id*. The Board concluded that the memorandum submitted by the employer demonstrated that current employees "would know that they would be eligible for remuneration under the employee referral program if they referred a successful candidate for the job for which labor certification was being sought." *Id*. at 6. In dicta,

the Board indicated that the employee referral program may be a "passive form of recruitment that requires little to no active solicitation of applications by the employer." *Id*. However, the Board declined to address the issue. *Id*.

In the instant case, the CO properly found that Employer failed to comply with the regulations by failing to provide adequate documentation of the incentive program. Like the employer in *Clearstream Banking*, Employer argues that its intranet site made employees aware that the incentives were available for the position in question; however, distinguishably, Employer provided no documentation to verify this assertion. While the Board in *Clearstream Banking* indicated that employee referral programs may require little to no active solicitation, some demonstration of a connection between the employee referral program and the recruitment efforts is required. Here, Employer did not provide documentation showing that current employees knew the referral program applied to the position in question. Therefore, the CO properly denied certification.

Based on the foregoing, we affirm the CO's denial of labor certification.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

A

Lee J. Romero, Jr.
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary

to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition, the Board may order briefs.